

# Gas ring fencing decision guide

AER draft guidance

September 2024

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# 1 Introduction and purpose

Ring-fencing refers to the separation of the contestable and non-contestable business activities of a regulated entity. It is an approach used in the regulation of monopoly businesses to ensure those businesses do not favour their own competitive activities to the disadvantage of other competitors operating in the market.

The National Gas Law (NGL) ring-fencing provisions have existed since the NGL was introduced in 2008. The gas ring-fencing provisions require the separation of pipeline businesses from related businesses, such as those that produce, blend, buy or sell gas. It aims to prevent a related business from gaining a competitive advantage (for example, in relation to the cost of transporting gas, or access to pipeline capacity) by virtue of its common ownership or operation of a gas pipeline. Such an advantage could reduce competition, lead to higher gas prices and distort investment signals for pipeline infrastructure, reducing the overall efficiency of the operation and use of gas services and harming the long-term interests of consumers. The gas ring-fencing provisions also recognise that there may be circumstances where the cost of complying with ring-fencing requirements may outweigh the public benefit resulting from compliance. Under these circumstances, it allows for exemptions to be made where the Australian Energy Regulator (AER) is satisfied it is in the public interest.

This gas ring-fencing decision guide has been developed by the AER and is intended to assist gas pipeline service operators to better understand their ring-fencing obligations, and, where relevant, how to apply for exemptions from certain obligations. It is intended to provide some additional context and information about the AER's powers and functions in relation to making ring-fencing decisions, processes for making ring-fencing decisions under the NGL and National Gas Rules (NGR), and clarification on the requirements for applications or notifications to the AER on ring-fencing matters.

The AER has published this guide under rule 35D of the NGR, which requires the AER to provide guidance on its powers, functions and processes in relation to ring-fencing decisions, and requirements for service providers. This requirement follows an amendment to the NGR, as recommended by the 2022 Australian Energy Market Commission (AEMC) final rules report for the Review into extending the regulatory frameworks to hydrogen and renewable gases.<sup>1</sup> The AEMC report recommended changes be made to the national gas regulatory framework, including the ring-fencing obligations, to bring hydrogen and renewable gas industries into its scope.

The amendment package also included other changes, including to improve the transparency of the AER's decisions, improve the consistency of the ring-fencing frameworks with other exemption frameworks in the AER, strengthening the associate contract arrangements, and clarifying the extension of the ring-fencing provisions to any covered gas (beyond only natural gas). As part of this, the AER was required to publish a ring-fencing decision guide, to ease compliance burden and to help service providers and market

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<sup>1</sup> AEMC, [Review into extending the regulatory frameworks to hydrogen and renewable gases](#), 24 November 2022, accessed 6 September 2024

participants make informed and efficient decisions on adapting to providing other covered gas services.

This guide covers the relevant gas ring-fencing provisions in Chapter 4, Part 2 of the NGL and Part 5 of the NGR. The AER's processes and decisions are undertaken in line with the requirements of the NGL and NGR. However, to the extent possible, we have included all relevant information that the AER considers necessary in relation to a ring-fencing decision (i.e. a ring-fencing determination, associate contract approval, exemptions and revocations), as at the time of publishing this guide. This is an information guide and is non-binding. While the AER has endeavoured to provide clarity on information required to be provided for ring-fencing decisions, this guide does not provide an exhaustive list and the AER may request additional information as necessary to support decision making.

This guide applies to both scheme and non-scheme pipelines as defined by Chapter 1 Part 1 of the NGL. Non-scheme pipelines became subject to ring-fencing provisions from March 2024.

We note that separate ring-fencing guidelines also exist for electricity distribution and transmission services.<sup>2</sup> There are similarities between the scope of the electricity ring-fencing requirements and the gas ring-fencing requirements. In particular, the minimum gas ring-fencing requirements (to not carry on a related business, and to maintain separation of staff and accounts) have counterparts in the electricity ring-fencing guidelines – for example, the requirements in those guidelines to keep specified types of services, which are regulated monopoly services, separate from other services.

There are also some distinct gas ring-fencing requirements which do not exist in the electricity ring-fencing guidelines – for example, those relating to associate contracts. Where applicable and relevant in this guide, we have ensured there is consistency in approach in the AER's assessment of, and requirements for, gas and electricity ring-fencing applications.

## **1.1 We are inviting submissions to this draft guide**

This version of the guide is a draft for public consultation and will be finalised subject to stakeholder feedback after close of the consultation period of 3 weeks from the time of its public release. The closing date for submissions can be found on the AER website.

We prefer to make written submissions publicly available to facilitate an informed and transparent consultative process. We will treat written submissions as public documents unless otherwise requested. Stakeholders should email any comments or written submissions to [gaspipelineexemptions@aer.gov.au](mailto:gaspipelineexemptions@aer.gov.au).

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<sup>2</sup> See AER's [Ring Fencing](#) webpage for further information.

## 2 Process for ring-fencing applications

### 2.1 How to apply

Proponents can email the Gas Pipelines Team regarding any ring-fencing matters at this address: [gaspipelineexemptions@aer.gov.au](mailto:gaspipelineexemptions@aer.gov.au). This email should be used for any gas ring-fencing matters including:

- applying for a ring-fencing decision;
- notifying the AER on a ring-fencing matter; or
- notifying the AER that a service provider no longer qualifies for an existing ring-fencing exemption.

Applications should state in the subject line of the email 'Application for a gas ring-fencing decision: Attn: Director, Gas Pipelines Team'. Notifications should state in the email subject line 'Notification on a ring-fencing matter: Attn: Director, Gas Pipelines Team'.

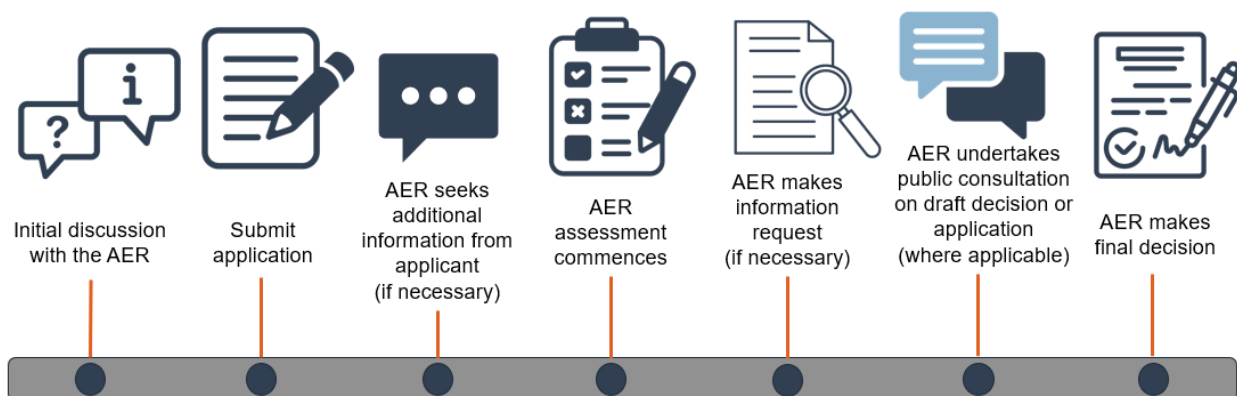
Once an application or a notification has been submitted to the AER, the timing within which we will provide a final decision depends on a number of factors including: the type of ring-fencing decision being made; the consultative procedures required for that decision under the NGR; and whether we issue an information request to the applicant.

Proponents are encouraged to contact the AER to discuss the application prior to making a formal submission. We generally will not begin our assessment of any applications that have not included sufficient information for the decision sought. We may request that proponents submit additional information before we will commence our assessment.

Once we have received and accepted your application, we will proceed to assess the application and publish decisions on our website.

We may also ask for additional information after we commence our assessment of an application. Depending on the ring-fencing decision being sought, we may seek written submissions on the application and/or our draft decision from stakeholders as part of the formal consultation prescribed by the NGL and NGR. In addition to this required process, we may also consult with other interested parties where needed.

We do not charge an application fee or an authorisation fee.



## 2.2 Required information – general particulars

While the information that should be contained in the application depends on the specific type of ring-fencing decision being sought, all applications should include the following information:

1. The name of the legal entity, or entities, seeking exemption/approval (as relevant).
2. The trading name if different to the legal name.
3. ABN or ACN.
4. A registered business address and address for correspondence.
5. A nominated contact person, including their position in the organisation and contact details.
6. The form of ring-fencing decision that is being sought (that is, relating to an associate contract approval, or an exemption).
7. Where relevant, significant dates when the new arrangements would apply (e.g. contract commencement).
8. The nature and scope of the new arrangements for which the application applies.

Applicants should refer to the relevant section in this guide for further details on other information that should be included in the application.

## 2.3 Our assessment

Our ring-fencing decision will be based on whether or not an application meets the criteria set out in the NGL and NGR and is guided by the National Gas Objective.<sup>3</sup> All assessments are made on a case-by-case basis. Although all applicants must meet the minimum criteria set out under the NGL and NGR, the particular considerations that we apply may vary between applicants depending on the complexity and the unique circumstances of each application.

We will advise you of our decision in writing and we will publish decisions on the AER's website. It will also include any conditions attached to the decision.

## 2.4 Public register of ring-fencing decisions

In accordance with rule 35E, our ring-fencing decisions are published on a public register on the AER's website<sup>4</sup>, along with details of the approved application and decision.

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<sup>3</sup> See NGL section 23, and in this guide section 4.2.2.

<sup>4</sup> [placeholder link to the public register]

### 3 Minimum ring-fencing requirements

There are minimum ring-fencing requirements for service providers which are set out in the NGL, under:

- section 139 (carrying on of related businesses prohibited);
- section 140 (marketing staff and the taking part in related businesses); and
- section 141 (accounts that must be prepared, maintained and kept).

The ring-fencing obligations under the NGL refer to three important definitions for ring fencing: “service providers”, “related businesses”, and “associate”.

A service provider is a person who owns, controls or operates (or intends to own, control or operate) a pipeline or any part of a pipeline.<sup>5</sup>

A related business is any of the following:

- a) the provision of a blend processing service;
- b) the business of producing primary gas, processable gas or biogas;
- c) the business of purchasing or selling covered gas, processable gas or biogas, but does not include purchasing or selling covered gas, processable gas or biogas to the extent necessary –
  - i) for the safe and reliable operation of a pipeline; or
  - ii) to enable a service provider to provide balancing services in connection with a pipeline.<sup>6</sup>

An associate<sup>7</sup> includes, but is not limited to, any of the following:

- a related body corporate (and its directors and secretary), including where the body corporate is controlled by or controls the service provider, or is a body corporate that is controlled by an entity that controls the service provider, or;
- a person who acts in concert with a service provider’s actions or proposed actions;
- a person with whom a service provider is, or proposes to become, formally or informally associated or related; or
- a person who has entered, or proposed to enter, into a transaction or has done, or proposes to do, any act or thing, in order to become associated or related with a service provider.

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<sup>5</sup> National Gas (South Australia) Act 2008 ('NGL'), section 8.

<sup>6</sup> NGL, section 137.

<sup>7</sup> Section 2 of the NGL provides ‘an associate in relation to a person has the same meaning it would have under Division 2 of Part 1.2 of the Corporations Act 2001 of the Commonwealth if sections 13, 16(2) and 17 did not form part of that Act.’ Please refer to the Corporations Act for the full definition of associate.



However, an associate does not include a person who gives advice to a service provider, or acts on a service provider's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship.

Service providers are required to adhere to the minimum ring-fencing requirements, which, unless it has received an exemption from the AER, requires the service provider to:

- not carry on a related business.<sup>8</sup>
- not share its marketing staff with an associate that takes part in a related business (and conversely, an associate in a related business cannot share marketing staff with the service provider).<sup>9</sup> Marketing staff is any officer, employee, consultant, or independent contractor/agent of the service provider who is also directly involved in the sale, marketing or advertising of pipeline services.<sup>10</sup>
- prepare, maintain and keep separate accounts in respect of pipeline services provided by means of every pipeline owned, operated or controlled by the service provider; as well as a consolidated set of accounts in respect of the whole of the business of the service provider.<sup>11</sup>

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<sup>8</sup> NGL, section 139.

<sup>9</sup> NGL, section 140.

<sup>10</sup> NGL, section 138.

<sup>11</sup> NGL, section 141.

## 4 Associate contract requirements

NGR rules 32, 32A and 33 refer to obligations relating to associate contracts set out in sections 147 and 148 of the NGL. These provisions prohibit service providers from entering into, varying, or giving effect to, associate contracts that have an anti-competitive effect in a market for covered gas services or are inconsistent with the competitive parity rule. This is unless it is an associate contract that the AER has approved (i.e. an approved associate contract).

An associate contract is a contract, arrangement or understanding for the provision of an associate pipeline service<sup>12</sup> between a service provider and:

- an associate;<sup>13</sup> or
- any person who provides a benefit to an associate and is not at arm's length to the service provider.<sup>14</sup>

### 4.1 Notification requirements for entering into new or varied associate contracts

There are 2 categories of associate contracts. Depending on the type of associate contract, notification must be made to the AER in advance of, or shortly after, the service provider entering into an associate contract.

- For specified associate contracts, the service provider must provide advance notification before entering into, or varying, the contract. Specified associate contracts are any associate contracts with an associate that carries on a related business,<sup>15</sup> other than an excluded associate contract.<sup>16</sup> The service provider must give AER written notice at least 20 business days before entering into the contract or variation. This notice must include the associate contract information, and description of key terms of the contract or variation, or form of the contract or variation of the contract, the service provider proposes to enter into.<sup>17</sup> Service providers must also provide notification after entering into, or varying, a specified associate contract (see section below).
- For all other associate contracts, a service provider must give AER written notice of an associate contract or variation within 5 business days after entering into or varying an associate contract. This must include a copy of the contract (or contract as varied), and:
  - for contracts and variations that have not been approved or not notified under rule 32A, also include the associate contract information; and

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<sup>12</sup> NGL Ch.1 Part 1, section 2(1); NGL Ch.3 Part 1, section 100.

<sup>13</sup> NGL, Ch.1 Part 1 section 2(1); Division 2 of Part 1.2 of the Corporations Act 2001.

<sup>14</sup> NGL, Ch.1 Part 1 section 2(1).

<sup>15</sup> See definition of a related business in section 3.1.

<sup>16</sup> Excluded associate contract as defined in NGR rule 31.

<sup>17</sup> NGR, rule 32A. Specified associate contracts do not include 'excluded associate contracts' as described under rule 31.

- for approved contracts or variations, or specified associate contracts that were notified under rule 32A, also include a statement describing changes to the information provided in the application or notification to the AER.<sup>18</sup>

## 4.2 Seeking AER approval for associate contracts

Service providers may apply to the AER for approval of an associate contract, a proposed associate contract, or a proposed variation of an approved associate contract.<sup>19</sup> Seeking AER approval for such associate contracts is only in relation to associate pipeline services.

### 4.2.1 List of matters the AER will have regard to

The AER will approve an application if the service provider has demonstrated, to the reasonable satisfaction of the AER, that its contract or variation does not have the purpose, or is unlikely to substantially lessen competition in a market for covered gas services, and is consistent with the competitive parity rule.<sup>20</sup> Where this is the case, there are no public consultation requirements for the AER to approve the application.

Where the AER is not satisfied that a contract or variation is unlikely to substantially lessen competition and/or is consistent with the competitive parity rule, but is satisfied the resulting public benefits would outweigh public detriment, the AER may nevertheless approve the application. In this circumstance, the AER must undertake public consultation before making a decision, following a standard consultative procedure (see below for the AER's consultative process).<sup>21</sup>

An approval may be subject to conditions the AER considers appropriate, which may include limiting the duration of the approval, providing that the approval will lapse on a material change of circumstances, or imposing reporting requirements on the service provider.

To support the decision-making process, we may make a request for additional information from the service provider, within 20 business days of receiving the application.<sup>22</sup> The type of additional information we may request could be for the purposes of, for example, clarifying or establishing the matters listed in this section.

#### Substantially lessening competition

In considering whether an associate contract has the purpose, or is likely to have the effect, of substantially lessening competition in a market for covered gas services, the AER will take the following non-exhaustive list of matters into account:

- the actual and potential level of competition in the relevant market for covered gas services;
- the extent of and significance of barriers to entry to the market;

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<sup>18</sup> NGR, rule 33.

<sup>19</sup> NGR, rule 32.

<sup>20</sup> NGR, rule 32(2).

<sup>21</sup> NGR, rules 32(3) and 32(3A).

<sup>22</sup> NGR, rule 32(6).

- the extent of and significance of any interdependencies between covered gas services provided by the service provider and any covered gas services provided by the associate;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that resulting contract or variation will significantly and sustainably increase prices or profit margins for the service provider or associate;
- the likelihood that the contract or variation would impact the emergence of a vigorous and effective competitor;
- the nature and extent of vertical integration in the market.

### **Competitive parity rule**

The competitive parity rule is set out in section 148(2) as: 'the rule that a service provider must ensure that any pipeline services that the service provider provides to an associate of the service provider are provided to that associate as if that associate were a separate unrelated entity'. We consider the terms and conditions as well as the manner in which the service provider provides pipeline services to associates as relevant considerations.

In considering the competitive parity rule, the AER will take the following non-exhaustive list of matters into account:

- in its dealings with the associate and a competitor (or potential competitor) for a pipeline service, whether the service provider treats the associate as if it were a non-associate (i.e. as if it had no connection or affiliation);
- in like circumstances, whether there was a deal or offer to deal with an associate and a competitor (or potential competitor) for a pipeline service on substantially the same terms and conditions;
- in like circumstances, the provision of substantially the same quality, reliability and timeliness of a pipeline service to an associate and a competitor (or potential competitor);
- whether information the service provider has obtained through its dealings with a competitor (or potential competitor) was disclosed where the disclosure would, or would be likely to, provide an advantage to the associate;
- in providing a pipeline service, whether the service provider treated an associate and competitor (or potential competitor) on equal terms, in terms of access to the (wholly or partly owned) pipeline and associated facilities;
- if the approach to, prioritisation, and duration (or likely duration) of negotiations with an associate and a competitor are undertaken in substantively the same way – e.g. not unnecessarily elongating negotiations with a competitor in preference of the associate;
- under similar negotiating positions, whether a competitor and associate would be treated equally and achieve similar negotiated outcomes for a specific contract for services.

## Public benefit or detriment

In considering public benefit or detriment, the AER will take the following non-exhaustive list of matters into account. These are included by way of example and is not intended to be an exhaustive or prescriptive list.

Public benefit. Some of the factors that may be relevant include:

- reduced transaction costs – which are the costs of buying and selling, and includes search, negotiation, approval, monitoring costs;
  - addressing an externality – which refers to costs incurred by third parties that are not internalised in a production or consumption decision (e.g. environmental impacts);
  - reduced information asymmetry – which refers to the imbalance in access to information about the price or quality of a good or service between buyers and sellers, leading to an imbalance in negotiating powers or poor purchasing decisions;
  - improved economies of scale, scope and density – which refers to: a reduced cost of production arising from increased output (scale); reduced costs of producing two or more products together (scope); or reduced production costs arising from an increase in the number of customers utilising the pipeline or service (density).
- Public detriment. These can include negative impacts that are outside of the market and imposed on the public, particularly the competitive detriment which will or is likely to result. For example, where the competitive process may be impacted through deterring, hindering, or preventing competition, because of an increase in market power.

We will also take into account the National Gas Objective in considering the public benefit or detriment, which is: to promote efficient investment in, and efficient operation and use of, covered gas services for the long term interests of consumers of covered gas with respect to (a) price, quality, safety, reliability and security of supply of covered gas; and (b) the achievement of targets set by a participating jurisdiction for reducing, or likely to contribute to reducing, Australia's greenhouse gas emissions.

### 4.2.2 Information to be provided in the application

In an application for AER approval of an associate contract, the service provider must include associate contract information containing:

- a description of the relationship of the associate to the service provider;
- a description of the business operated by the associate; and
- a 'statement of reasons' from the service provider, which states the reasons it considers the contract or variation:
  - i) does not have the purpose, and is unlikely to have the effect, of substantially lessening competition in a market for covered gas services; and
  - ii) is not inconsistent with the competitive parity rule.<sup>23</sup>

For these statement of reasons, service providers should consider the non-exhaustive list of matters the AER considers relevant for considering impacts on competition, competitive

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<sup>23</sup> NGR, rules 32(1A) and 31.

parity, and public benefit or detriment (see above section). To the extent possible, we expect that the statement is substantiated with factual analysis and evidence, which may include the information below. These are included by way of example and is not intended to be an exhaustive or prescriptive list.

- **Competition impacts:**

- information on the size and concentration of the market;
- information demonstrating why the contract would not substantially reduce the level of market competition;
- reasons why the contract would not affect the ability for others to enter and compete in the market;
- potential price impacts on covered gas services that would arise from the associate contract;
- evidence of any market testing. This could include analysis of the market supply and demand (including historical demand) of pipeline services with or without the associate contract, to show whether the associate contract leads to capacity constraints for users, or why alternative suppliers cannot provide the service.

- **Competitive parity:**

- whether the terms and conditions of the associate contract or proposed associate contract are substantially the same as the standing terms, or the terms that a competitor is likely to achieve in the circumstances (and providing evidence for this);
- what measures, and what assurance processes, will be implemented to ensure that pipeline services to the associate and a competitor will be provided in the same manner and without preferential treatment;
- how the applicant has/will ensure negotiations with an associate and a competitor, in like circumstances, will be undertaken in the same way for similar services;
- measures, and assurance processes, which would ensure the associate is not treated in a favourable manner to a competitor in any way;
- where market testing was undertaken, how the process ensured other providers who may be well placed to provide the service were not excluded.

Where the service provider considers the associate contract or variation has the purpose, or is likely, to have an anti-competitive effect, or is inconsistent with the competitive parity rule, the statement must instead contain the reasons for its view. It must also set out why the public benefit that would result from the associate contract or variation would outweigh any resulting public detriment.<sup>24</sup>

- **Public benefit or detriment:** Applicants should provide sufficient evidence to satisfy the AER of the public benefit or detriment. Where possible, the applicant should provide quantitative estimates of the public benefit and cost of entering or giving effect to the associate contract. The applicant should note that, in weighing the benefits and detriments, we will consider the likelihood and timing of the benefit or detriment occurring and the strength and basis of the evidence provided. The following is included by way of example and is not intended to be an exhaustive or prescriptive list:

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<sup>24</sup> NGR, rule 32(1B).

- reasonable estimates of efficiency gains (or losses), including any assumptions, arising from the associate contract for the applicant or the overall provision of covered gas services;
- how the cost of pipeline services will be improved for other market participants, and whether the associate contract may increase price competition/reduce costs;
- reasonable estimates of negative impacts from reduced industry competition arising from the associate contract, including any assumptions, and whether this may reduce price competition/increase costs to the detriment of the public;
- how the associate contract affects service reliability to the benefit or detriment of the public;
- what measures will be implemented to mitigate public detriment associated with the associate contract.

### 4.2.3 AER's timing for making a decision

The AER's timeframe to make and publish a decision depends on what decision is being made and whether we need to undertake public consultation.<sup>25</sup>

- If the service provider demonstrates to the reasonable satisfaction of the AER that an associate contract or variation does not have any anti-competitive purpose and is unlikely to have any anti-competitive effect,<sup>26</sup> the AER must approve the application within 40 business days and is not required to conduct public consultation. The AER must publish its decision as soon as practicable after the associate contract or variation is notified to the AER under rule 33.<sup>27</sup>
- If the AER decides not to approve the application as we are not satisfied that an associate contract or variation does not have any anti-competitive purpose and is not likely to have any anti-competitive effect, the AER must reject the application within 40 business days.<sup>28</sup> In this case, the AER is not required to conduct public consultation. The AER must publish its decision as soon as practicable after the decision is made.<sup>29</sup>

If the AER is not satisfied that an associate contract or variation does not have any anti-competitive purposes and is not likely to have any anti-competitive effect, subject to public consultation, the AER may still approve an associate contract or variation if we are satisfied that the resulting public benefit would outweigh any resulting public detriment.<sup>30</sup> (See below section which describes the consultative procedure when the AER is considering approving an application which does not satisfy the associate contract requirements). The NGR does not prescribe an overall timeframe in which the AER must make a decision in these circumstances, however we will aim to make a decision within 6 months, allowing for stakeholder consultation and assessment. There may be circumstances where additional time will be required, particularly where there

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<sup>25</sup> For these decisions, where public consultation is required, the AER must undertake a standard consultative procedure.

<sup>26</sup> NGR, rule 32(2)

<sup>27</sup> NGR, rule 32(5).

<sup>28</sup> NGR, rule 32(5).

<sup>29</sup> NGR, rule 32(8)(b).

<sup>30</sup> NGR, rule 32(3).

are complex or contentious issues that require a more extensive AER assessment or consultation on the potential public benefit or detriments (including any impact on competition) that may result from the associate contract. In these circumstances, the AER may require more time to assess and settle on positions for specific issues that arise in the application, and to undertake further internal and external consultation to refine the assessment against various criteria. The AER must publish its decision as soon as practicable after the associate contract or variation is notified to the AER under rule 33.<sup>31</sup>

If the AER makes an information request,<sup>32</sup> the AER must make a decision within 40 business days (if this timeframe is applicable to the decision) plus the number of business days between issuing the information request to the day when AER receives the information requested from the service provider.

#### **4.2.4 AER's consultative process**

Where the AER is considering approving an associate contract or variation which has an anti-competitive purpose or is likely to have anti-competitive effect under rule 32(3), the AER must follow the standard consultative procedure which involves the AER:

- publishing a notice describing the proposal and allowing 15 business days for written submissions from the date of the notice;
- after considering relevant submissions made to the notice, making a draft decision. If the draft decision identifies changes to the proposal that should, in the AER's opinion, be made, notifying the applicant of the draft decision and reasons for it, and give the applicant a reasonable opportunity to modify its proposal in light of the decision;
- publishing the draft decision and any modifications of the proposals in light of the draft decision, and a notice inviting written submissions and comments on these – allowing for at least 15 business days for submissions;
- considering all submissions and comments in making its final decision which will be published within 20 business days after the consultation period ends for the draft decision;
- publishing the final decision on AER's website and giving copies to the applicant and parties to the administrative process in which the decision is made.<sup>33</sup>

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<sup>31</sup> NGR, rules 32(3A) and 32(8)(a).

<sup>32</sup> NGR, rule 32(6).

<sup>33</sup> NGR, rule 8.



## 5 Exemptions and revocations

### 5.1 Exemptions from requirements may be granted

NGR rules 34, 35, and 35B refer to circumstances when exemptions can be granted from minimum ring-fencing requirements (sections 139-141) and associate contract requirements (sections 147-148). See previous sections in this guide for detailed description of these ring-fencing provisions. The relevant provisions on exemptions in the NGL are sections 148A (exemptions from particular requirements) and 148AA (exemptions from section 147(c)).

The NGR and NGL provides for exemptions from the ring-fencing provisions in recognition that there may be circumstances when the cost of compliance may outweigh the public benefit that can be achieved from complying with a requirement. Service providers may apply for exemptions from one or more of the minimum ring-fencing requirements and associate contract requirements.<sup>34</sup> For exemption applications, the AER must undertake an expedited consultative procedure.

A service provider must notify the AER without delay if circumstances change and it no longer qualifies for an exemption that has been granted.<sup>35</sup>

Service providers do not need to apply for an exemption for the minimum ring-fencing requirements and associate contract requirements if the following circumstances apply:

#### **Exemptions deemed to apply to certain pipelines**

Pipelines for which an exemption has been granted under Category 1 in Part 10 Division 2 Subdivision 2 of the NGR, are exempt from both minimum ring-fencing and associate contract requirements. These are non-scheme pipelines (that are not third party access pipelines), which are exempt from certain obligations to publish Part 10 information. However, if the Part 10 exemption is revoked, then the exemption for minimum ring-fencing and associate contract requirements will also cease 12 months after the Part 10 revocation takes effect (or for a longer period determined by the AER).<sup>36</sup>

#### **Exemptions deemed to apply for section 147(c)**

Service providers may be exempt from the requirements in section 147(c) of the NGL for associate pipeline services relating to biomethane, hydrogen, synthetic methane or gas blends, or a prescribed primary gas (including blends). For an exemption to apply, the provision in an associate contract (in relation to these associate pipeline services) must have been entered into before 2 March 2023 or before the gas became a prescribed primary gas by regulation.<sup>37</sup>

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<sup>34</sup> NGR, rule 34.

<sup>35</sup> NGR, rule 34(6).

<sup>36</sup> NGR, Rule 35B.

<sup>37</sup> NGL, section 148AA.

## Exemptions deemed to apply to certain trial projects

'Designated entities'<sup>38</sup> are taken to have been granted an exemption from the minimum ring-fencing requirements in sections 139 and 140 in relation to a designated trial project for the transition period. (There are 4 designated trial projects and 3 designated entities at the time of publishing this guide but this may change).<sup>39</sup> This exemption from the specified prescribed requirement is subject to the designated entity complying with conditions set out in NGR Schedule 7 Part 2. The designated entity must provide the following information to the AER by 12 June 2025 and each year thereafter:<sup>40</sup>

- the separate accounts in respect of the services provided by the designated entity by means of the trial project; and
- the methodology used by the designated entity to allocate costs to the designated trial project.

### 5.1.1 Matters AER will consider

#### Exemptions from section 139

Section 139 of the NGL states that a service provider must not carry on a related business. The AER will grant an exemption from this ring-fencing requirement if the AER is satisfied these three criteria are met:<sup>41</sup>

- a. either the relevant pipeline is not a significant part of the pipeline system for any participating jurisdiction, or the service provider does not have a significant interest in the relevant pipeline and does not actively participate in the management or operation of the pipeline.
- b. the cost of compliance with the relevant requirement for the service provider and its associates would outweigh the public benefit resulting from compliance.
- c. the service provider has, by arrangement with the AER, established internal controls that substantially replicate the controls that would apply to associate contracts if the related business was carried on by an associate of the service provider and sections 147 and 148 of the NGL applied.

Examples of internal controls include, but are not limited to:

- internal processes and lines of responsibility for notifying the AER if the service provider proposes to modify or enter into, and notifying the AER after entering into, an associate arrangement for providing pipeline services either internally or to an associated entity; and
- extending the internal definition of 'associate' and 'associate contracts' to include internal staff and arrangements.

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<sup>38</sup> NGR Schedule 7 Part 2, Rule 2(4).

<sup>39</sup> These designated entities, designated trial project, and the prescribed requirements they are exempt from are set out in NGR Schedule 7 Part 2(4).

<sup>40</sup> NGR Schedule 7 Part 2, Rules 2(2) and 2(3).

<sup>41</sup> NGR, Rule 34(3).

### **Exemptions from section 140 or 141**

Section 140 of the NGL requires that the service provider must not share its marketing staff with an associate that takes part in a related business (and vice versa), while section 141 requires the service provider keep separate accounts in respect of its pipeline services.<sup>42</sup> The AER will grant an exemption from section 140 or section 141 of the NGL if the AER is satisfied that the cost of compliance with the relevant requirement for the service provider and its associates would outweigh the public benefit resulting from compliance.<sup>43</sup>

However, where the AER considers that compliance with a requirement under sections 139, 140 or 141 would lead to increased competition in a market, we will disregard compliance costs associated with losses arising from increased competition in upstream or downstream markets.<sup>44</sup>

### **Exemptions from section 147 or 148**

Sections 147 and 148 prohibit service providers from entering into, varying, or giving effect to, associate contracts that have an anti-competitive effect in a market for covered gas services or are inconsistent with the competitive parity rule. There are no prescribed criteria the AER must consider in granting an exemption from sections 147 or 148, however the AER will consider, amongst other things, whether the service provider provided the AER with the relevant notification of the associate contract and any application and decision regarding the associate contract under rule 32.

## **5.1.2 Information to be provided in the application**

For exemption applications from one or more of the minimum ring-fencing requirements or associate contract requirements, the applicant should include all relevant information relating to the matters listed in section 5.1.1.

The below (non-exhaustive) list of matters may be included in support of an exemption application. The following is included by way of example and is not intended to be an exhaustive or prescriptive list:

- reasonable estimates of tangible net costs and benefits (including details of any assumptions) to allow the AER to assess whether the additional compliance costs are justified by the potential benefits. This may include avoided loss of operational efficiencies or higher ongoing or one-off costs (estimated for the exemption period if one is proposed);
- information on the boundaries of the costs or benefits – e.g. whether it is limited by jurisdictional borders;
- evidence demonstrating that the risk of cross-subsidisation (between the covered gas pipeline services provided by the service provider, and any other services) is sufficiently addressed or does not arise. This should reference the service provider's cost allocation methodology;

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<sup>42</sup> NGL, Ch.1 Part 1 section 2(1); Division 2 of Part 1.2 of the Corporations Act 2001.

<sup>43</sup> NGR, Rule 34(4).

<sup>44</sup> NGR, Rule 34(5).

- information relating to the efficiency impacts of functional separation of marketing services or maintaining records of separate accounts;
- information quantifying the relative size and importance of the pipeline in the jurisdiction, including throughput, entry and exit points, delivery and receipt points and number of users for each pipeline service;
- corporate information, such as financial accounts, corporate structures, and information on company operational controls over pipelines or parts of a pipeline, which demonstrates the level of interest and ownership in the relevant pipeline;
- corporate information which demonstrates separation and independence of the service provider from the management or operation of the pipeline;
- the nature of competition in the market and reasons why the market would benefit from the service provider's participation in the related business, or not affect the ability for others to enter and compete. This can include information on the degree of market concentration (number of suppliers versus number of customers), and potential improvement in service reliability for end users;
- special characteristics of this market which impact market contestability – e.g. limited participants in geographically remote locations; outcomes from any market testing that was conducted; potential price impacts on other market participants;
- information such as contract terms and conditions or internal governance to demonstrate whether the service provider would likely be competing on equal footing or potentially obtain an advantage over other market participants where an exemption is granted;
- information on how the service provider's proposed internal controls substantially replicate the relevant controls that would apply to associate contracts;
- distinguishing between the services that will be provided by the service provider and other market participants;
- what measures will be implemented to mitigate any public detriment that may arise from granting the exemption.

### **5.1.3 Exemption conditions**

Before granting an exemption from one or more of the minimum ring-fencing requirements and associate contract requirements, the AER must consider whether to impose conditions on the exemption.<sup>45</sup>

Examples of conditions include but are not limited to: ensuring business activities are conducted or structured in a specific manner; public disclosure of certain information about the business; setting an expiry date; or limiting the scope of the exemption.<sup>46</sup>

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<sup>45</sup> NGR, Rule 35.

<sup>46</sup> NGL, s 148A.

The AER may vary an exemption condition, on its own initiative or upon application from the service provider, following public consultation under an expedited consultative procedure.<sup>47</sup>

#### **5.1.4 AER's consultative process**

For exemption applications, the AER must undertake an expedited consultative procedure.<sup>48</sup> This includes the AER publishing a draft decision and notice, inviting written submissions within 15 business days from the date of the notice and then making a final decision within 20 business days of the closing date for submissions. The AER also has the discretion to consult prior to publishing the draft decision.<sup>49</sup>

## **5.2 AER can revoke or vary a ring-fencing decision**

Provisions in the NGR relating to ring-fencing revocations or variations are set out in NGR rules 35A (revocation) and 35F (variations and revocations of decisions for material error or deficiency).

The AER must revoke, on its own initiative or on application made by any person, an exemption where the AER forms the reasonable opinion that relevant exemption criteria in rule 34 is no longer satisfied.<sup>50</sup> For example, the AER may reconsider an exemption where we believe the cost of compliance no longer outweighs the public benefit from compliance, or where there are material changes in ownership, management, or other interests in a pipeline that warrants a review of the exemption. A revocation decision must undergo public consultation and must be determined in accordance with the expedited consultative procedure. The revocation will take effect on the date specified in the AER's revocation decision.

The AER may vary or revoke a ring-fencing decision or a variation of an exemption condition following consultation with the service provider and any other persons with whom it considers consultation appropriate if the variation or revocation is necessary in order to address a material error or deficiency of one or more of the following kinds:

- a) a clerical mistake or an accidental slip or omission;
- b) a miscalculation or misdescription; or
- c) a defect in form.

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<sup>47</sup> NGR Rule 35(4). See also NGR Rule 35F.

<sup>48</sup> NGR, Rule 9.

<sup>49</sup> NGR, Rule 9(2).

<sup>50</sup> NGR, Rule 35A.

## 6 Additional ring-fencing requirements

The AER may make a ring-fencing determination to impose additional ring-fencing requirements on a service provider or associate to do (or refrain from doing) a thing specified in a determination.<sup>51</sup> We may do this of our own initiative. This is pursuant to NGR rule 30 and NGL sections 143-145, which sets out the AER's functions in relation to making a ring-fencing determination. The AER must undertake an expedited consultation process before making its decision.

### 6.1 Matters AER must consider

In specifying additional ring-fencing requirements, the AER must have regard to the following principles which, in general, aim to prevent preferential treatment of related entities and associates:

- a) in the case where 1 part of the business of a service provider (**business unit A**) is providing pipeline services to another part of the business of the service provider (**business unit B**), the service provider must ensure that business unit A provides the pipeline services to business unit B as if business unit B were a separate unrelated entity;
- b) in the case where a service provider is providing pipeline services to an associate of the service provider, the service provider must ensure that those services are provided as if the associate of the service provider were a separate unrelated entity;
- c) users and prospective users should have sufficient information in order to understand whether a service provider is complying with paragraph (a) or (b), and
- d) the likely compliance costs that will be borne by an efficient service provider or associate in complying with an additional ring-fencing requirement.

Upon a final decision being made, the AER will notify, in writing, the relevant service provider or associate of the making of that determination and provide a copy of the determination.<sup>52</sup> Additional ring-fencing requirements do not limit the applicability of the minimum ring-fencing requirements.<sup>53</sup>

The determination will specify the date from which the additional ring-fencing obligations come into effect. That date will be at least 10 business days after the service provider or associate is given a copy of the determination.<sup>54</sup>

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<sup>51</sup> NGL, section 143.

<sup>52</sup> NGL, section 143(3).

<sup>53</sup> NGL, section 142.

<sup>54</sup> NGL, sections 144(4)-(5).

## 6.2 AER's consultative process

The NGR requires that a proposal from the AER to impose additional ring-fencing requirements for a specified service provider or associate must be subject to the expedited consultative procedure.<sup>55</sup>

## 6.3 Information required from service providers

During consultation, a service provider may choose to provide additional information and assist the AER with making a determination. Information should be directly relevant to the matters considered in the draft determination or otherwise as requested by the AER.

In providing information to the AER in relation to additional ring-fencing requirements, service providers may address the matters that AER has regard to listed in the above sections of this guide to demonstrate why they consider that an AER's ring-fencing determination is unnecessary for ensuring that associates and related entities do not receive a competitive advantage (whether through preferential treatment or otherwise).

This may include information such as:

- information regarding the service provider's internal and/or external procedures and controls that demonstrates the AER's proposed additional ring-fencing requirements should not be imposed in full or in part.
- corporate information<sup>56</sup> which demonstrates separation and independence from any related businesses, and processes which ensure equal treatment between associates and competitors in lieu of the proposed additional ring-fencing requirement.<sup>57</sup>
- reasonable estimates of tangible costs (and benefits), including the basis for any assumptions to allow the AER to assess whether the potential benefits from the additional ring-fencing requirement justifies the additional compliance costs.

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<sup>55</sup> National Gas Rules ('NGR'), Rule 30.

<sup>56</sup> For example, financial accounts, corporate structures, information on company operational controls over pipelines or parts of a pipeline, or published information on corporate processes in place.

<sup>57</sup> Sections 4.2.1 and 5.1.3 of this guide can also be referred to for the type of information applicants could provide.

# Glossary

Term	Description
Additional ring-fencing requirements	This is a requirement for the service provider to do (or refraining from doing) a thing specified in a ring-fencing determination under section 143 of the NGL.
AER	Australian Energy Regulator
Associate Contract	Under NGL Chapter 1 Part 1, a contract, arrangement or understanding between a service provider and an associate of the service provider in connection with the provision of an associate pipeline service; or  (b) a contract, arrangement or understanding between a service provider and any person in connection with the provision of an associate pipeline service—  (i) that provides a direct or indirect benefit to an associate; and  (ii) that is not at arm's length;
Associate pipeline service	Under NGL Chapter 1 Part 1, a pipeline service provided by means of a pipeline other than one to which a greenfield incentive determination applies.
Competitive parity rule	Under section 148(2) of the NGL, the rule that a service provider must ensure that any pipeline services that the service provider provides to an associate of the service provider are provided to that associate as if that associate were a separate unrelated entity
Covered gas services	Under NGL Chapter 1 Part 1, a pipeline service, the supply of covered gas (a primary gas or gas blend), or a service ancillary to the supply of covered gas
Excluded associate contract	Under NGR rule 31, means, for a service provider:  (a) for a scheme pipeline - a contract for the provision of a pipeline service at the reference tariff and on the standing terms published under rule 101C;  (b) for a non-scheme pipeline – a contract for the provision of a pipeline service on the standing terms that apply to the pipeline service published under rule 101C; or  (c) an associate contract in respect of which the service provider has made an application under rule 32(1).
Greenfields incentive determination	Under section 100 of the NGL, an AER determination for a pipeline the subject of a green fields pipeline project which cannot become a scheme pipeline during the operative period for the determination
Marketing staff	Under section 138 of the NGL, any officer, employee, consultant, or independent contractor/agent of the service



Term	Description
	provider who is also directly involved in the sale, marketing or advertising of pipeline services
NGL	National Gas Law
NGR	National Gas Rules
Non-scheme pipeline	A gas pipeline other than a scheme pipeline. In general, it is subject to light AER regulation
Pipeline service	Under NGL Chapter 1 Part 1, a service provided by means of a pipeline, as defined in NGL Ch.1 Part 1
Related business	<p>Under section 137 of the NGL, means the following:</p> <p>(a) the provision of a blend processing service;</p> <p>(b) the business of producing primary gas, processable gas or biogas;</p> <p>(c) the business of purchasing or selling covered gas, processable gas or biogas, but does not include purchasing or selling covered gas, processable gas or biogas to the extent necessary—</p> <p>(i) for the safe and reliable operation of a pipeline; or</p> <p>(ii) to enable a service provider to provide balancing services in connection with a pipeline.</p>
Ring-fencing decision	Under NGR rule 35C, means a ring-fencing decision as defined in NGL Chapter 1 Part 1; a variation of the exemption conditions under rule 35; and a decision to revoke an exemption under rule 35A.
Ring-fencing determination	Under section 143 of the NGL, an AER determination requiring a service provider or associate of a service provider named in the determination to do, or refrain from doing, a thing specified in the determination
Scheme pipeline	Under NGL Chapter 1 Part 1, a gas pipeline to which a scheme pipeline determination applies; or a designated pipeline; or a pipeline in respect of which a scheme pipeline election takes place. In general, it is subject to full AER price regulation, and must submit access agreements to AER for approval
Service Provider	Under section 8 of the NGL, a person who owns, controls or operates, or intends to own, control or operate, a pipeline or any part of a pipeline
Specified associate contract	Under NGR rule 31, means any associate contract between a service provider and an associate that carries on a related business, other than an excluded associate contract